No. 89-1536

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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

G. WAYNE HALL, Individually And As Next Friend Of APRIL LYNN HALL, MINOR; RONALD WYATT, Individually And As Next Friend Of NICOLE WYATT, MINOR; MARTIN URAND; and KATY INDEPENDENT SCHOOL DISTRICT,

Petitioners,

v.

CNA INSURANCE COMPANIES and CONTINENTAL CASUALTY CO.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND IN SUPPORT OF RESPONDENTS' REQUEST PURSUANT TO RULE 42.2 FOR SANCTIONS

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QUESTIONS PRESENTED

1. Whether as a matter of Texas state law the bodily injury exclusion of a Board of Education liability insurance policy bars coverage for a judgment entered against a school teacher in an action brought pursuant to 42 U.S.C. § 1983 by students who suffered physical injuries in a tug-of-war accident?

2. Whether sanctions should be imposed on Petitioners and/or their counsel for filing a misleading and frivolous petition?

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston are correctly identified in the caption of this Opposition, except that there is no legal entity known as "CNA Insurance Companies." Rather, "CNA Insurance Companies" is a fleet name for a group of insurance companies, including Respondent Continental Casualty Company. The parent company of Continental is CNA Financial Corporation, which in turn is owned in part by Loews Corporation. Healthco, Inc. is a non-wholly owned subsidiary of Continental.

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JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3), which has been repealed. This Court lacks jurisdiction under 28 U.S.C. § 1257(a), which replaced the repealed provision cited by Petitioners, because no federal question is presented.

STATEMENT OF THE CASE

A. Underlying Facts

1. The Accident

This case arises from an accident on February 5, 1981, during a tug-of-war event at an elementary school in which Petitioner April Hall lost three fingers on her left hand, and Petitioner Nicole Wyatt lost skin from her fingers and some fingernails. Petitioner Martin Urand was one of the three teachers who supervised the tug-of-war. D Ex-BE 1.[1]

2. The Federal Action

On July 19, 1984, Hall and Wyatt sued Petitioner Katy Independent School District ("KISD"), Urand and ten other individuals alleging violations of their constitutional rights in connection with the tug-of-war accident. *G. Wayne Hall a/n/f April Hall, et al. v. Katy Independent School District, et al.*, C.A. No. H-84-3042 (S.D. Tex.) (the "Federal Action"). D Ex-BE 1; D Ex-BE 24.

After receiving notice of this suit, Respondent Continental Casualty Company[2] ("CNA") advised KISD that the Board of Education Liability ("BEL") insurance policy that it issued to KISD bars coverage for claims for damages arising from bodily injury. Specifically, the BEL Policy precludes coverage for any claims for:

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[1] Citations to the record in this brief are in the following form: "SF" refers to the Statement of Facts; "SF-BE" refers to Bill of Exceptions portions of the Statement of Facts; "Pl. Ex" refers to plaintiffs' trial exhibits; "D Ex" refers to Respondent's trial exhibits; "D Ex-BE" refers to Respondent's Bill of Exceptions exhibits; and "TR" refers to the Transcript.

[2] The trial court also entered judgment against "CNA Insurance Companies," although there is no such legal entity. "CNA Insurance Companies" is a fleet name for a group of insurance companies, including Continental Casualty Company.

> any damages, direct or consequential, arising from bodily injury, sickness, disease, or death of any person.

Pl. Ex. 46 A. CNA suggested that KISD contact its comprehensive general liability carrier, Fidelity & Casualty Company, whose policy covers claims for bodily injury. SF Vol. XIV 2629-30, D Ex-BE 1.

Fidelity & Casualty thereafter provided a defense, subject to a reservation of rights, for KISD and the individual defendants in the Federal Action through the Houston law firm of Vinson & Elkins. SF-BE Vol. XIV-A 2645, 2666-67, 2670; D Ex-BE 4, 5. On August 5, 1985, Vinson & Elkins filed a motion for summary judgment in the Federal Action, demonstrating conclusively that an isolated case of negligence cannot as a matter of settled law be raised to the level of a constitutional violation. D Ex-BE 8, 23. Rather than respond on the merits to this motion, Hall and Wyatt consented to an order dismissing the Federal Action with prejudice as to two defendants, and without prejudice as to KISD, Urand and the other defendants. The Federal Action was dismissed accordingly. D Ex-BE 28.

3. The Collusive State Action And Urand's False Stipulation

(a) *The State Action Against Urand*

On June 13, 1985, Hall and Wyatt filed a new suit in the 240th Judicial District of Texas against only Urand, alleging the same kinds of purported constitutional violations asserted in the pending Federal Action. *G. Wayne Hall a/n/f April Hall and Ronald Wyatt a/n/f Nicole Wyatt v. Martin Urand*, Cause No. 50,471 (the "State Action"). D Ex-BE 19. Without being served with the complaint, Urand immediately agreed to certain Stipulations and Agreements (the "Stipulation") in which he falsely confessed to liability. D Ex-BE 17. Hall, Wyatt and Urand did not give notice of the State Action to

CNA, Fidelity & Casualty, KISD, the other parties to the Federal Action or the judge hearing the Federal Action, Honorable Carl O. Bue. SF-BE Vol. XIV-A 2653, 2679, SF-BE Vol. XIV-C 2809-10; D Ex-BE 1.

(b) *The Consent Judgment*

On Monday, June 17, 1985, two business days after the State Action was filed, Judge Charles A. Dickerson entered a judgment (the "Consent Judgment") awarding Hall $7,365,000 for the loss of three fingers and Wyatt $3,560,000 for the loss of skin from her fingers and fingernails. D Ex-BE 18. The Consent Judgment also approved a Covenant Not To Execute And Assignment by which Hall and Wyatt agreed not to execute on any of Urand's assets and not to record the Consent Judgment, and to split the proceeds of their planned suit against CNA with Urand.[3] *Id.* Judge Dickerson immediately ordered the Court's file sealed. D Ex-BE 20.

B. Proceedings In The Trial Court

After waiting 30 days for the Consent Judgment to become final, Hall, Wyatt and Urand brought the instant action in the 240th Judicial District against CNA and certain Texas citizens. On December 23, 1985, Judge Dickerson, the same judge who had approved the Consent Judgment, held on a motion for partial summary judgment that the claims purportedly asserted in the State Action were covered under the Policy, and that CNA was liable for the "face amount" of the Consent Judgment, *i.e.*, $10,925,000, notwithstanding its $1 million policy limit. TR 279. He also held that because CNA had wrongfully denied coverage it could not assert its defenses that: (i) the Consent Judgment was procured by

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[3] Urand assigned his rights under the BEL Policy to Hall and Wyatt, except that Urand "specifically retained an equal interest with Plaintiffs, in all monies recovered pursuant to this assignment in excess of the face amount of [the Consent Judgment]." D Ex-BE 18.

fraud and collusion; (ii) the amount of the Consent Judgment was unreasonable; (iii) the Consent Judgment was not the result of an actual trial or adversary proceeding; and (iv) CNA did not receive notice of the suit in which the Consent Judgment was entered. Finally, Judge Dickerson ruled that Urand's actions in entering into the deal that led to the Consent Judgment were reasonable as a matter of law. *Id.*

Following a trial at which Judge Dickerson entered all 51 paragraphs of three extraordinary motions in limine filed by plaintiffs, thereby effectively stripping CNA of any ability to defend itself, the jury found that CNA's handling of the claim had violated the Texas Deceptive Trade Practices Act and the Texas Insurance Code. On August 22, 1986, Judge Dickerson entered final judgment against CNA in the total amount of $22,565,756, of which $5,153,908 was awarded to Urand, the gym teacher whose negligence allegedly caused the tug-of-war accident. TR 1308, 1309, 1413. On his own motion, Judge Dickerson also entered a gag order directing the parties to keep confidential all matters relating to the State Action, including the amount of the Consent Judgment. TR 1273.

In a separate case, which was consolidated on appeal, Judge Dickerson held that Petitioner KISD was entitled to coverage under the BEL policy for the attorneys' fees charged by its independent counsel in the Federal Action, Bracewell & Patterson, which assisted Vinson & Elkins in defending that case. Cause 50-515A, TR 479.

C. Proceedings On Appeal

On appeal, the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston reversed the decision below, and entered judgment for CNA. *Continental Casualty Co. v. Hall*, 761 S.W.2d 54 (Tex. Ct. App. 1988, *writ denied*). It held that the bodily injury exclusion of CNA's policy clearly bars coverage for the claims purportedly asserted by Hall and Wyatt against

Urand. The Court of Appeals also reversed the judgment in favor of KISD in the separate action on the same grounds. The Texas Supreme Court declined to review the decision of the appellate court.

Petitioners did not raise any federal question in either the trial court or on appeal, and the Texas Court of Appeals did not decide any federal question. The case was decided solely as a matter of state law interpretation of the insurance contract. *See Continental Casualty Co. v. Hall*, 761 S.W.2d at 56.[4]

SUMMARY OF ARGUMENT

Petitioners' assertion that this case presents issues concerning the proper interpretation of 42 U.S.C. § 1983 is a flat-out misrepresentation. This is purely and simply a state law insurance contract case. Petitioners never presented—and the state court never decided—any federal question. Accordingly, the petition should be denied.

Moreover, because the petition is misleading and patently frivolous, the Court should award Continental just damages in the amount of its attorneys' fees incurred in responding to the petition, plus double costs, pursuant to Rule 42.2 of the Rules of this Court.

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[4] CNA raised several federal constitutional issues as defenses. It asserted, for example, that as a matter of due process it could not be bound by a judgment entered in a case where it had neither notice nor an opportunity to defend, and that it was entitled to assert its defense that the Consent Judgment was obtained by fraud and collusion. CNA also asserted that the trial court's conduct of the trial was so outrageously unfair as to deprive it of due process, and that the award of punitive damages against it under the circumstances of this case could not pass constitutional muster. The Court of Appeals did not reach any of the constitutional issues raised by CNA.

ARGUMENT

I. THE PETITION IS FRIVOLOUS

1. This case presents only a state law question concerning the proper interpretation of an insurance contract. Hall and Wyatt obtained (albeit by out-and-out fraud and collusion) a judgment against Urand for purported violations of their constitutional rights. Hall and Wyatt then joined Urand in bringing this action against CNA seeking recovery under the insurance policy for the damages awarded against Urand in the underlying § 1983 action. The case does not raise, and the Texas Court of Appeals did not consider, any issue concerning what kinds of damages may be recovered by a plaintiff in a § 1983 action. It decided only that under Texas law the BEL policy does not provide coverage for a defendant in a § 1983 case where the underlying injury is a bodily injury. *Continental Casualty Co. v. Hall*, 761 S.W.2d 54.

This holding is in accord with every other decision on point. In *Continental v. City of Richmond*, 763 F.2d 1076 (9th Cir. 1985), for example, a municipality demanded coverage under a public officials liability policy for a § 1983 lawsuit filed against it by the children of a man who was allegedly beaten to death in a city jail. The Court of Appeals for the Ninth Circuit held that the policy's bodily injury exclusion, which was identical to that at issue here, precluded coverage. The Court explained:

> In summary, it is clear to us that the injuries suffered by [the decedent] are of the category specifically excluded from coverage by the CNA policy. It is equally obvious that when the term "arising from" is interpreted in the light of existing precedent and the express policy language, the heirs' claims indisputably "arise from" the injuries incurred by [the decedent]. Thus, the CNA policy provides no coverage for the heirs' claims.

Id. at 1081. All other decisions on point have reached the same conclusion. *Continental Casualty Co. v. McAllen Indep. School Dist.*, 850 F.2d 1044 (5th Cir. 1988) (under CNA BEL policy, school was not entitled to coverage for constitutional claims asserted by student who suffered burns when he placed potassium in his pocket); *Foreman v. Continental Casualty Co.*, 770 F.2d 487 (5th Cir. 1985) (under CNA BEL policy, school board was not entitled to indemnification for sums paid in connection with suit against school officials for damages resulting from physical assault and sexual molestation); *see also Cotton States Mut. Ins. Co. v. Crosby*, 244 Ga. 456, 260 S.E.2d 860 (1979); *McKinney v. Greene*, 379 So. 2d 69 (La. Ct. App. 1979), *writ denied*, 381 So. 2d 1233 (La. 1980); *Town of Brattleboro v. Travelers Ins. Co.*, 141 Vt. 402, 449 A.2d 945 (1982).[5]

2. Petitioners suggest that *City of Richmond*, *Foreman* and their progeny determined rights under § 1983 (Pet. at 8), and are somehow at odds with the holding of the Court of Appeals for the Eleventh Circuit in *Gilmere v. City of Atlanta*, 864 F.2d 734 (11th Cir.), *cert. denied*, 110 S. Ct. 70 (1989). But *City of Richmond* and *Foreman* dealt only with the question of what insurance coverage is available under applicable state law to § 1983 *defendants*. *Foreman v. Continental Casualty Co.*, 770 F.2d at 489 (applying Mississippi law); *Continental Casualty Co. v. City of Richmond*, 763 F.2d at 1079-81 (applying California law); *see also Continental Casualty*

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[5] The decision of the Ninth Circuit in *Interstate Fire & Casualty Co. v. Stuntman, Inc.*, 861 F.2d 203 (1988), is not on point. As Petitioners concede, *Stuntman* did not involve questions of coverage for constitutional claims. (See Pet. at p. 10). Moreover, the policy provisions are distinguishable. Unlike the broad exclusionary language in CNA's BEL policy, the policy in *Stuntman* provided, under the coverage section, for payment of damages, direct or consequential, because of liability for *bodily injury, shock, sickness or disease*, but, under the exclusion, only stated that the policy did not apply to *bodily injury for performers*. *See id.* at 204.

Co. v. McAllen Indep. School Dist., 850 F.2d at 1046 (applying Texas law). In contrast, *Gilmere* was a § 1983 suit in which the district court awarded $20,000 in compensatory damages based on the decedent's actual injuries, but declined to award additional damages for violations of the decedent's Fourth Amendment rights and assault and battery because to have done so would have resulted in double recovery for the same injuries. 864 F.2d at 740-41.

Thus, unlike *City of Richmond*, *Foreman*, *McAllen* and this case, *Gilmere* adjudicated a § 1983 claim. Whether the holding in *Gilmere* conflicts with decisions in other § 1983 suits is irrelevant to this insurance coverage action.

3. Next, Petitioners falsely allege (Pet. at 13) that *Foreman* and *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) reflect a split among lower federal courts with regard to the origin of damages in § 1983 cases. *Foreman* denied a school board recovery under an insurance policy because "the [bodily injury] exclusion focuses on the kind of injury, not on the type of wrongful act." 770 F.2d at 489. The question in *White*, on the other hand, was whether a § 1983 plaintiff who had suffered non-physical injuries had stated a valid cause of action. Thus, *Foreman* is purely and simply a state-law insurance case, and decided an entirely different question than did *White*.

II. REQUEST FOR SANCTIONS

Rule 42.2 of the Rules of this Court expressly provides that "[w]hen a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs." This case presents a classic example of the abuse that Rule 42.2 is intended to prevent. Petitioners seek review by this Court of a case that does not present any federal question, and in which they did not even purport to raise any federal question below. It

is difficult to imagine how a petition could be more frivolous. Moreover, as explained above, the petition is clearly misleading in suggesting that this is a § 1983 case, not an insurance contract case.

Under these circumstances, sanctions are appropriate both to compensate CNA for its expenses in responding to the frivolous petition, and to deter others from burdening the Court with similarly meritless and misleading petitions. Accordingly, CNA requests that the Court award it damages in the amount of its attorneys' fees incurred in responding to the petition, plus double costs.

CONCLUSION

The petition for a writ of certiorari should be denied, and sanctions should be imposed on Petitioners and/or their counsel.

Respectfully submitted,

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